

The Ethics of Migration Policy Dilemmas

Residence, Citizenship, and Attempting Political Compromise on Regularisation: A Response to Song and Bloemraad (2022)

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In their compelling article, Sarah Song and Irene Bloemraad (2022, 34) argue that their various “rule of law arguments for legalization mitigate the dilemma between justice and the rule of law. It is not only principles of justice but also principles of the rule of law that offer support for extending a path to citizenship to unauthorized migrants.” Let me offer three remarks focusing, in turn, on how for most migrants secure residence rights (or other rights, such as the right to study or work) are more important than citizenship, on questioning the legitimacy of rule of law arguments given constantly shifting immigration laws and policies that are sometimes manifestly unjust by most definitions of justice, and on the possibility of narrowing the gap between justice and rule of law using variegated rights and statuses, prioritising what is possible politically.

First, in the quote above it is important to distinguish between residence rights and a path to citizenship. In the United States and many other countries (such as Canada, where almost everyone who becomes a permanent resident later becomes a citizen), permanent residence is often seen as simply an intermediate step on the path to citizenship. Yet most migrants or would-be migrants – certainly the bulk of the irregular population in the United States, the primary population inspiring Song and Bloemraad’s article – see immigration as an instrumental step towards the goal of a better life, achievable primarily through work and better opportunities for their children. To the extent this is true, the key for such migrants is guaranteed and secure legal rights of residence, not necessarily the further rights entailed by full citizenship. (This claim has many provisos, such as exempting refugees or those who would become stateless, and assumes that permanent residence confers the same level of social rights as citizenship. Obviously, residence would not be as attractive as citizenship if only citizens had access to meaningful social rights.) The distinction between residence and citizenship is not simply a minor semantic difference, but a separate and additional step with significant political consequences, including partisan effects. In the United States, for example, Republicans worry that enfranchising large numbers of irregular migrants

would benefit Democrats. Naturalisation of irregular migrants whose residency status has been regularised might be more feasible politically if the time of residence required for naturalisation started from the moment of regularisation rather than that of the unauthorised entry, and were perhaps even longer (to counter the idea of 'queue-jumping') than the time required of 'regular' immigrants.

More broadly, extending 'amnesty' to irregular migrants would likely be more palatable politically if it did not quickly and inexorably lead to the 'reward' of citizenship. Indeed, the tension between welcoming immigrants and wanting to curtail their rights or power has existed for as long as there have been states, and probably longer. When political leaders in the northern Dutch provinces started to feel threatened in the 1580s by the growing power of immigrants from the southern provinces, they limited access to citizenship and invoked a rule restricting political office to those born in the province. Justifying this exclusion from citizenship and the impossibility of naturalisation, the eminent jurist Hugo Grotius explained that immigrants from the southern provinces should be satisfied with their right to reside without holding citizenship, since their native-born children would be able to run for political office even though they themselves could not ([Maas 2013, 396](#)). Such exclusion from citizenship for first-generation immigrants in the sixteenth century Netherlands depended on the longstanding tripartite distinction between citizens (with full rights), inhabitants (with most rights except political ones), and foreign residents (with rights to reside and usually little else). Depending on laws and policies that changed constantly and varied from place to place, foreign-born individuals would gain the status of inhabitant but never that of citizen, even by purchase, though some cities did allow foreigners to purchase citizenship. Exclusionary tendencies also increased in response to growing immigration: in 1624, for example, the city of Rotterdam tightened its exclusions by targeting not only the foreign-born but also their native-born children, decreeing that "no persons shall be nominated to Vroedschap (Council) other than those born Hollanders and born of Hollander parents"; thus even the local-born children of immigrants could no longer hold office, only the grandchildren could ([Maas 2013, 397](#)). Some states around the world today still restrict access to certain rights to those born as citizens, excluding those who were naturalised – in the United States, for example, only a 'natural-born' citizen may become president – or even possibly restricting rights of second-generation immigrants.

The argument for prioritising stable rights of residence over full rights of citizenship loses power to the extent that states may revoke residence rights; if residence is not secure and states engage in discrimination, revocation of status, or even deportation of permanent residents, migrants will of course prefer citizenship. Through the operation of *jus soli*, the United States along with most other states in the Americas would not violate norms against statelessness by extending residence but not citizenship. By contrast, states whose nationality laws depend primarily on *jus sanguinis* do create a permanent class of non-citizens to the extent there is no path to citizenship for permanent residents and their children or grandchildren. The case of the United Arab Emirates provides an extreme example of how the status of resident can become a permanent form of exclusion, through visa renewals, inaccessible naturalisation, and even the state purchasing a foreign nationality so that inhabitants from a minority group become citizens of another state (see [Lori 2019](#), discussing the UAE government's purchase of Comoros citizenship for UAE-born Bidoon, giving them documents but no actual rights on the Comoros, with which they have no

ties; and more generally discussing the UAE's exclusion from citizenship of over 80 per cent of its resident population). Similar examples of long-term residents excluded from naturalisation abound. Song and Bloemraad's article considers mostly labour migrants rather than refugees or such 'permanently temporary' populations, and for labour migrants they advocate secure residence rights rather than the option to stay as irregular migrants, even if the price of secure residence rights is (because of the need for political compromise with those opposed on principle to a 'reward' for 'rule-breakers') delayed access to citizenship.

II

Second, it is important to be clear about the specific definitions of justice and rule of law that are putatively at odds with each other in the case of legalisation. On what moral grounds can someone be denied a right to enter, reside, study, work, and perhaps ultimately to join the political community? A hard-line open borders position holds that everyone (barring those who would actively seek to cause havoc) should enjoy such rights, and would not distinguish between regular and irregular (or 'legal' and 'illegal') entry, because the whole idea of limiting immigration is suspect. Song and Bloemraad (2022, 36) head in that direction when they write that policymakers "should ask how the regular immigration system can be transformed to minimize future unauthorized migration. One way to do this would be to design migration programmes to address actual migration pressures as reflected in patterns of unauthorized migration". The reason is that irregular migration is largely a function of the opportunities for legal migration, which change constantly: the "distinction between authorized and unauthorized immigration is murky and constantly being transformed as states change their immigration policies" (Maas 2010, 235). Arguably, addressing actual migration pressures and patterns means recognising that states can never fully 'control' immigration and that therefore there should always be opportunities for regularisation. (See Hollifield et al. 2022, comparing how various states attempt to manage migration, and assessing the dilemma of immigration control versus immigrant integration.) Put more starkly, the only complete way to prevent all unauthorised migration is to authorise all migration.

Short of such an approach, one can only agree with Song and Bloemraad about the desirability of increasing pathways for entry of less skilled workers without family connections, providing temporary worker programmes that enable circular migration but also a route to more permanent status, and development assistance to sending countries to address structural push factors. But I would qualify their prescriptions by emphasising that not every status needs to lead to permanent and equal rights, even if such rights are preferable from a democratic theory perspective. As the above historical example shows (or indeed the actual immigration policies of most modern states, such as the myriad visa statuses available for entry to the United States or other developed countries), states can and do offer multiple statuses, not all of which lead to permanent rights in the same timeframe. The compatibility with justice of each such statuses or set of rights is not a foregone conclusion and needs to be examined independently.

Even such an innocuous right as the right to study can be curtailed on moral grounds if a prospective student is suspected of wanting to study for nefarious purposes. For example, a 2012 law requires the US government to deny visas to Iranian students whose coursework

would prepare them to work in the energy or nuclear sectors in Iran, and every year many students are denied visas – or even have their visas revoked at the last minute. Similar policies affect students from China and other states with which the US has diplomatic conflicts (Zraick 2019). Here justice should probably dictate individual assessment rather than blanket bans, because surely not all prospective science and engineering students from countries like Iran or China have intent that runs counter to US interests. More broadly, the fact that immigration laws and policies as well as their application to individual cases constantly shift, and do so in unpredictable ways, undermines the entire notion of rule of law, because rule of law is premised on stability rather than volatility and insecurity.

More fundamentally, developed states have limited the available immigration options to such an extent that for many people there is simply no legal pathway to immigrate. This fact makes desperate people take desperate risks. When prospective migrants regularly die in their attempts to immigrate (on the US-Mexico border, in the Mediterranean, and elsewhere), how can states possibly claim that adherence to rule of law justifies the continuing loss of lives? The regular and persistent deaths of would-be immigrants attempting to reach developed countries, including of children and others whom it would be callous to label as rule-breakers, forces us to consider that exclusionary immigration laws may be inherently unjust, and therefore that attempts to reconcile 'rule of law' (even in Song and Bloemraad's expanded definition) and 'justice' are doomed to fail.

III

Yet consider the possibility of narrowing the gap between justice and rule of law using variegated rights and statuses. A recent book examines the role of money in curbing or facilitating entry for certain migrants over others, for participation in society, and even for obtaining and exercising citizenship (De Lange, Maas, and Schrauwen 2021). Policies that value the life of someone who is rich as worth more than the life of someone who is poor clearly go against norms of equality and shared humanity. Yet governments can and do discriminate, and have always done so; thus perhaps the 'rule of law' in immigration matters is doomed to be unjust, because all immigration laws value some people more than others. Song and Bloemraad (2022, 34) conclude that the "ethical dilemma will persist so long as there are borders" – which is true, but elides the fact that the delineation between legal and illegal migration remains in constant flux (Maas 2010, 233). The creative use of different forms of statuses might help square the circle.

Most governments around the world restrict access to rights and benefits to 'insiders' and exclude 'outsiders', and the idea of restricting benefits to insiders enjoys considerable democratic legitimacy. Such restrictiveness occurs not only at the national level but also at the subnational and supranational ones; in fact it happens in any jurisdiction in which finite resources drawn from a finite population could be extended to people outside that population (Maas 2017, 579). Returning to the idea that naturalising large numbers of irregular migrants is politically explosive, and that wanting to curtail the rights of immigrants is a historical constant, regularisation programs may be more palatable politically if 'rule-breakers' face consequences (such as a different status than full citizenship, or a longer timeline to full political rights, even while enjoying guaranteed rights to reside, work, study, etc.), or at least are not 'rewarded' for having broken entry rules, even if the moral justice

of those rules is suspect because there are no means of entering legally. Pragmatism might dictate such compromises until unjust laws can be made more just.

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About the “Dilemmas” project

This commentary contributes to the [‘Dilemmas’ project](#) at the EUI’s Migration Policy Centre. Dilemmas analyses and debates fundamental ethical dilemmas in policy-making on migration and refugee protection.

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